CITY AND COUNTY OF SAN FRANCISCO

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Michael Massey, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Yosemite Creek Superfund Site, San Francisco, CA

Dear Mr. Massey:

We write on behalf of the City and County of San Francisco (the "City") in response to the United States Environmental Protection Agency's ("EPA") letter of November 7, 2008. This letter provides the City's initial submission regarding the City's entitlement to the third party defense to CERCLA liability set forth in 42 U.S.C. §9607(b)(3). We have endeavored to provide EPA with as detailed statement as possible within the time permitted that resolves the City's status as a potentially responsible party for the Yosemite Creek Superfund Site. Documents referenced herein will be provided to EPA separately in electronic format. If EPA has further questions or requires additional information, please advise and we will supplement as needed. EPA's timetable did not allow sufficient time to respond to the PRP Group's November 4, 2008 memorandum (which we received from you on November 12) and we have focused our resources on the City's affirmative showing. To the extent we (or EPA, for that matter) believe a further response is warranted, we will provide it by December 5, 2008.

Under CERCLA, the City is entitled to a complete defense to liability under the "third party defense" if the release:

> [was] caused solely by an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that
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> (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all the relevant facts and circumstances, and
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> (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. §9607(b)(3). Based on our discussions, EPA's November 7 letter, and the PRP Group's November 4 memorandum, we understand the disputed issue to be the City's "due care"

in operating its sewer system related to the Yosemite Creek contamination. We therefore limit our discussion here to subsections (a) and (b) of Section 9607(b)(3).[1]

Whether the third party defense is satisfied will depend on the unique facts and circumstances of each case:

> Courts have interpreted [the due care] requirement by looking to the legislative history of CERCLA, which provides that the party asserting a third party defense "'must demonstrate he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all the relevant facts and circumstances.'"

United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1263, 1276 (E.D.Cal. 1997) (quoting *New York v. Lashins Arcade Co.*, 91 F. 3d 353, 361 (2d Cir. 1996) (emphasis added). *See also Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053, 1082 (C.D. Cal. 2003).

Applying this standard to the contamination problem at Yosemite Creek, the City must show it took due care with respect to the "hazardous substance concerned" (here, polychlorinated biphenyls (PCBs); pesticides DDT, dieldrin and chlordane; and metals lead, zinc, and mercury), "taking into consideration the characteristics of such hazardous substances, in light of the relevant facts and circumstances." 42 U.S.C. §9607(b)(3)(a). Because EPA believes the City's combined sewer system was the conduit for waste from the former Bay Area Drum Site to travel to Yosemite Creek during wet weather events, it is necessary to review the state of knowledge over the past century regarding environmental impacts from municipal sewer system discharges and, in particular, combined sewer system overflows ("CSOs").

The indisputable record here shows that the City was ahead of the curve in treating both stormwater and sanitary waste through a combined system, made impressive efforts to meet (and in many cases exceed) the evolving environmental and regulatory standards, and worked closely with State and Federal regulators to adopt and implement waste water control measures that met these changing standards. The City's sewer system has, and continues to achieve, levels of pollutant removal unequaled by any other community in California. To hold the City liable today for adverse impacts from its CSOs decades ago would have the illogical and unfair result of holding the City to a higher standard than the EPA and state and local authorities across the country. There is simply no basis for imposing PRP liability on the City for the current situation at the Yosemite Creek Superfund Site.

I. The City Was at the Forefront of National Efforts to Control Overflows from Combined Sanitary and Stormwater Sewer Systems

The City has a combined sewer system that collects sewage and stormwater in the same network of pipes, which is then collected, pumped, treated, and discharged to the San Francisco

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[1] In so limiting this response, the City does not concede that EPA or any other party can establish the City's liability under CERCLA as either an "owner," "operator," or "arranger" and reserves all of its rights to dispute and, if necessary, litigate liability for the Yosemite Creek Superfund Site. *See, e.g., Fireman's Fund Insurance Company v. City of Lodi*, 302 F.3d 928, 946 (9th Cir. 2002) (citing *Lincoln Properties, Ltd. v. Higgins*, 823 F.Supp. 1528, 1539-44 (E.D.Cal.1992)) ("While we decline to decide whether Lodi is a PRP on the record before us, we note that it is doubtful whether Lodi may be considered a PRP merely as a result of operating its municipal sewer system.")

Bay and Pacific Ocean. In most cities, street storm drains flow directly out into creeks, lakes or oceans. While several cities around the country have combined sewers, including Boston, New York and Philadelphia, San Francisco is one of only two in California. Capturing and treating stormwater is just as important as sewage because of contaminants such as car oil, metals and litter that wash into the sewers from city streets. Before discussing the specifics of the City's combined system and its changes over time, it is helpful to first review the historical record with respect to the standards and practices for managing and controlling CSOs.

Prior to the 1960s, the use of combined sewer systems and potential for CSOs was not foreseen as a threat to surface water or sediments. The incarnation of combined sewer systems in the United States began in the late 1800s. Due to a growing understanding of the relationship between sewage and disease, in the 1870s, studies were conducted in the United States to determine whether to use existing storm drainage infrastructure to convey wastewater or construct separate sanitary sewers. The consensus was to combine them by "conveying the waste through existing stormwater drainage sewers to receiving water bodies, where it was thought that there was enough dilution to render it harmless." [2] It was not until later in the "second half of the 20th Century that [sanitary officials] began to grasp the serious water pollution threat posed by overflows." [3]

Specifically, the "nationwide significance of pollution caused by storm generated discharges was first identified in the 1964 United States Public Health Service's publication" on the significance of pollution from CSOs.[4] Although the report recognized CSOs were a significant part of water pollution, the estimated costs of addressing separating sanitary systems from stormwater systems at $30 billion were too great and the report thus recommended alternative, less costly solutions be investigated.[5] By then, however, more than 1,300 communities in the United States had combined sewer systems.[6] In response to the Public Health Services findings, in 1965, Congress, under the Federal Water Pollution Control Act of 1965, authorized funds for research, development and demonstration of techniques for controlling CSOs.

In 1969, the State of California, in adopting the Porter-Cologne Water Quality Act, created the first comprehensive legal regulation of pollutant disposal activities. This Act contains a complete regulatory framework for the regulation of all waste discharges (i.e., waste discharge requirements) to both surface and ground waters of the State. Porter-Cologne was followed, at the Federal level, by the Federal Water Pollution Control Act Amendments of 1972 (the "Clean Water Act'). The Clean Water Act required the states or the EPA to set standards for surface water quality, mandate sewage treatment, and regulate wastewater discharges into the nation's surface waters pursuant to permits under the National Pollutant Discharge Elimination

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[2] http://www.epa.gov/ednnrmrl/researchtopics/wetweatherflow/cso.pdf (accessed November 12, 2008).

[3] *Id.*

[4] USEPA, *Urban Stormwater Management and Technology: An Assessment*, EPA-670/2-74-040, (Dec. 1974), at iv.

[5] Anderson, *The CSO Sleeping Giant: Combined Sewer Overflow or Congressional Stalling Objective*, 10 Va. Envtl. L.J. 371, 383 (1991).

[6] USEPA, *Handling and Disposal of Sludges from Combined Sewer Overflow Treatment*, EPA-600/2-77-053a (May 1977), at 6.

System ("NPDES"). It established a multi-billion dollar Clean Water Grant Program that, together with the Clean Water Bond funding approved by California's voters, assisted communities in building municipal wastewater treatment facilities.

The Clean Water Act provided 75% funding for planning, design and construction of wastewater facilities. It also created a program under the EPA to approve projects, administer the grant funds, and enforce compliance with the laws. California joined the effort by creating its own grant program to fund an additional 12.5% of project costs, providing a total 87.5% funding for qualified California municipal water pollution control projects. The subsequent administration of grants and the enforcement of regulations in the San Francisco Bay region have been a joint undertaking of EPA, the California State Water Resources Control Board (the "State Board") and the San Francisco Bay Regional Water Quality Control Board – San Francisco Bay Region (the "Regional Board").

Although the goal of the Clean Water Act was to eliminate the discharge of pollutants into the nation's waters, CSOs were not specifically addressed in the original statute. Instead, through its $18 billion funding allocation, initial implementation of the Clean Water Act focused on assisting municipalities in upgrading existing waste treatment systems and building new sewage treatment plants. It was not until 1977 that Congress included a provision in amendments to the Act mandating that EPA report on the status of CSOs in municipal treatment works operations, including an analysis of the problem of pollution from CSOs in relation to treated effluent discharges, technological alternatives available to cities for correcting overflow problems, and any recommendations of EPA for legislation to address the problem of CSOs, including whether a separate authorization and grant program should be established by the Congress to address them. *See* 33 U.S.C.§1375(c).

As EPA later noted in a guidance document,

> Historically, control of CSOs has proven to be extremely complex. This complexity stems partly from the difficulty in quantifying CSO impacts on receiving water quality and the site-specific variability in the volume, frequency, and characteristics of CSOs. In addition, the financial considerations for communities with CSOs can be significant. The [EPA] estimates the CSO abatement costs for the 1,100 communities served by CSSs to be approximately $41.2 billion.

USEPA, Combined Sewer Overflows, Guidance for Long-Term Control Plan, EPA 832-B-95-002, September 1995, at 1-1 to 1-2.[7]

In light of these challenges, EPA's Office of Water issued a National Combined Sewer Overflow (CSO) Control Strategy on August 10, 1989, which established the first nation-wide approach to developing and issuing NPDES permits for CSOs. August 10, 1989 USEPA memorandum setting forth its final National Combined Sewer Overflow (CSO) Control Strategy.[8] This strategy had three objectives: (1) to ensure that if CSO discharges occur, they

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[7] http://www.epa.gov/npdes/pubs/owm0272.pdf.

[8] The memorandum was published in the Federal Register on September 8, 1989 at 54 Fed. Reg. 37,370 (Sept. 8, 1989), (available at http://www.epa.gov/npdes/pubs/owm0356.pdf).

are only as a result of wet weather; (2) to bring all wet weather CSO discharges in compliance with the CWA's technology-based requirements and state water quality standards; and (3) to minimize water quality and other adverse impacts from wet weather overflows. *Id.*

Yet it wasn't until nearly five years later, and after negotiations with states, municipalities and environmental groups, that EPA published its Combined Sewer Overflow (CSO) Control Policy ("CSO Control Policy") in the Federal Register on April 19, 1994. 59 Fed. Reg. 18,688 (Apr. 19, 1994)[9] The City played a substantial role in developing the CSO Control Policy. This policy describes a "phased process for achieving control of CSOs and compliance with the technology-based and water quality-based requirements of the Clean Water Act." *See* USEPA January 1, 1997 Memorandum Regarding Deadline for Nine Minimum Controls in Combined Sewer Overflow Control Policy.[10] The first phase of the CSO Control Policy was the implementation of nine minimum controls by January 1, 1997. According to EPA, by 1998, only 52% of CSO communities were implementing these nine controls.[11] As discussed *infra*, because the City proactively addressed its CSO problems early on, by 1998 it was in compliance while many other communities were not.[12] And, for the past ten years, the City has been in compliance with all requirements of the CSO Control Policy.

II. Historical Overview of the City's Combined Sanitary and Stormwater Sewer System

A. The City's Early Sewer Planning and Facility Construction

San Francisco's sewer system was built in several phases. The original system was designed to carry combined sanitary and stormwater flows to the shoreline, and by 1899, more than 150 miles of combined sewers had been built. The first master plan was prepared in 1899 and recommended consolidating all the sewers, reducing the number of outfalls and creating design standards of how sewers should be built in the future. A second master plan was developed in 1935, with the purpose of eliminating bacteriological contamination of the receiving waters. The City recognized the need to prevent pollution of the shoreline and retained experts in the field to prepare this document. The 1935 master plan recommended (1) dividing San Francisco into three drainage basins, each with its own sewage treatment plant; (2) diverting to the treatment plants all dry weather flows and all storm runoff from storms of intensities greater than 0.2 inches of rainfall per hour; and (3) continuing use of combined sewers.[13] By 1935, the City had installed 700 miles of sewers.[14]

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[9] http://www.epa.gov/npdes/pubs/owm0111.pdf.

[10] http://www.epa.gov/*npdes*/pubs/owm0130.pdf.

[11] USEPA Memorandum Re Implementation of CSO Control Policy (May 19, 1998) (available at http://www.epa.gov/npdes/pubs/elements-to-adress.pdf).

[12] EPA's CSO Control Policy also called for permittees to develop and implement long term CSO control plans that would "ultimately result in compliance with the CWA." 59 Fed. Reg. at 18,691.

[13] City and County of San Francisco, Department of Public Works, *Overview Facilities Plan, San Francisco Master Plan Wastewater Management,* assisted by J.B. Gilbert & Associates, (August 1975), at 9-10 ("1975 Facilities Plan Overview").

[14] By 1971, this number had increased to approximately 1,000 miles of sewers ranging in size from 8 inches in diameter to a multi-barrel sewer 10 feet high by 40 feet wide. San Francisco

The City's first treatment plant, the Richmond-Sunset Water Pollution Control Plant in Golden Gate Park, went on line in 1938, at least twelve years before the formation of any enforcement agency for pollution control. (It has since been decommissioned.) Construction of the other two treatment plants, the North Point and the Southeast plants, was delayed until 1951 because of World War II. Both plants are still in operation today.[15] Most of these facilities were financed by general obligation bonds.

Beginning around the time these additional treatment plants were built, several significant events were occurring in the area of water pollution control. The California Dickey Water Pollution Act, which took effect October 1, 1949, created the State Water Pollution Control Board, set statewide policies for pollution control, and established nine regional water pollution control boards in each of the major California watersheds. In 1967, the State Water Resources Control Board was created. Two years later, in 1969, the Porter-Cologne Water Quality Control Act was passed. Then, in 1972, as discussed above, the Clean Water Act ("CWA") was enacted.

The City's wastewater management program kept pace, endeavoring to anticipate the possible water quality requirements that might be established by the various federal and state agencies under these new statutes. Between the years 1951 and 1971 the City spent an estimated $130 million for the construction of intercepting sewers, diversion structures, pumping stations, and treatment plants to comply with contemporaneous standards. Funding for capital programs was a challenge given that federal funds were only available to applicants having unfavorable financial conditions and no state funds were available for financial aid until 1970. *See* San Francisco Master Plan for Waste Water Management, Preliminary Summary Report, prepared by Department of Public Works, September 15, 1971, at I-4 ("Preliminary Summary Report").[16]

According to a 2007 report published by the San Francisco Estuary Institute and the Regional Monitoring Program for Water Quality in the San Francisco Estuary, San Francisco's efforts up until the 1970's were in accord with those of other municipalities in the Bay Area. "Until the first treatment facilities were built – mostly after 1950 – raw sewage entered the Bay via streams or sewers."[17] San Francisco's Richmond-Sunset treatment plant was one of the first

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Master Plan for Waste Water Management, Preliminary Summary Report, Prepared by Department of Public Works, September 15, 1971, at III-1.

[15] *Id.* at 10.

[16] Limited funding for wastewater control and treatment was available prior to the 1970s. The Clean Water Act provided tremendous resources for cities beginning in 1973:

> The Federal Construction Grant program became the largest nonmilitary public works program since the Interstate Highway System. Bay Area facilities were early and active participants in the Program, which originally provided 75% of project costs from federal sources, with the state contributing another 12.5%. The local share of project costs was thus only 12.5%, which made the construction of wastewater facilities viable for most communities.

2007 Estuary Institute Report, at 11.

[17] "The Pulse of the Estuary, Monitoring and Managing Waster Quality in the San Francisco Estuary, 2007", published by the San Francisco Estuary Institute and the Regional Monitoring

treatment plants built in the entire Bay Area.[18] Most communities in the Bay Area constructed primary treatment plans in the 1950s.[19]

B. Early Work by the City to Address Wet Weather Overflows

By the 1960s, the City recognized it faced three significant challenges with respect to its sewer system: (1) further developing the system to handle the five-year storm event without street flooding, (2) improving the capabilities of the City's three treatment plants, and (3) addressing overflows from the combined sewer system via numerous outfalls during wet weather events (which occurred, in an average year, 82 times). Preliminary Summary Report. The wet weather overflow problem was in part caused by use of smaller diameter sewer lines in the early years of system construction. As the City's population grew and it became more developed, the City's design standards for collecting and transporting storm runoff improved. However, the sizes of many sewers from the existing system were not adequate to handle runoff from the five-year storm event. Preliminary Summary Report, at III-1 to III-7.

Prior to the late 1960s, the Regional Board's primary concern relative to the City's sewer system was improving the effluent quality from the City's three treatment plants, although both the City and the Regional Board were concerned about wet weather overflows. In 1964, the City allocated $1.5 million from a bond issue to study wet weather controls. The City's Department of Public Works evaluated the feasibility of separating the City's combined system but concluded there were significant costs and little benefits of such an approach. In 1966 the City's Board of Supervisors passed a resolution establishing as policy that the City develop a means of controlling and treating its wet weather overflows. Pursuant to that policy, the City applied for federal research grants to characterize the constituent make-up of the combined overflows,[20] evaluate treatment options, and study the storage facilities and other infrastructure needed for overflow control. This work included the design, construction and evaluation of a combined sewer overflow treatment facility at the Baker Street Outfall in the Marina District. Preliminary Summary Report, at V-2 to V4.[21] In 1970, the City passed a $65 million bond issue, of which $35 million was allocated for treatment plant upgrades and $30 million was to be used for the initial phase of the Wet Weather Pollution Control Program. Preliminary Summary Report, at III-7.

Beginning in the late 1960s, the Regional Board stepped up its demands of the City, including a resolution in 1967 calling for the Board of Supervisors to adopt a new sewer master plan by June 1971. A complete list of the Regional Board's regulatory actions vis-à-vis the City's sewer system and the City's response thereto from 1967 to 1975 may be found at pages 10-13 of the 1975 Facilities Plan Overview.

Program for Water Quality in the San Francisco Estuary ("2007 Estuary Institute Report"), at 8 (http://www.sfei.org/rmp/pulse/2007/index.html).

[18] *Id.* at 9.

[19] *Id.*

[20] As of 1971, the major constituents of the overflows were identified to be suspended solids, grease, phosphates, COD and floatables, and nitrogen. 1971 Master Plan, at XII-35 (also XII-2).

[21] *See also* USEPA, Storm and Combined Sewer Demonstration Projects, Federal Water Pollution Control Administration, January 1970, at 74.

C. 1971 Wastewater Master Plan Proposed to Overhaul the City's Sewer System

In September 1971, the City published a new comprehensive Master Plan for Waste Water Management ("1971 Master Plan"), culminating several years of efforts and providing the City with a short and long-range plan for the solution of the major problems facing the sewer system. The plan called for construction of an integrated system of sewers, tunnels, pumping stations, treatment plants, and outfall facilities. As supplemented, the 1971 Master Plan was approved by the Board of Supervisors in July 1973.[22] The City's plan was lauded by EPA for "its advanced concepts of automated systems control and monitoring... the relative wet-weather treatment capacity of 8 times the average dry-weather flow, the proposed use of physical treatment" and the use of storage.[23] The total program was estimated at the time to cost up to $900 million. Further, it was acknowledged by the USEPA that the "implementation is to be phased over a period of 30 years."[24]

In 1974, a joint Environmental Impact Report/Statement (the "EIR/S") was prepared by the EPA and the City. The EIR/S evaluated the environmental effects of the implementation of the 1971 Master Plan and ensured that there was full public review. The EIR/S for the 1971 Master Plan was adopted by the Board of Supervisors and certified by the Regional Administrator for EPA Region 9. With subsequent refinements, the 1971 Master Plan was the City's roadmap for meeting the requirements of the State and federal water quality laws and for improving the performance of the City's sewerage system.

The outcome of the 1971 Master Plan changed the dry weather treatment locations from three to two, one serving the westside of the city and one serving the bayside of the city. All dry weather flow would be (and, in fact, is) treated to secondary treatment levels at the Southeast or Oceanside treatment plants. The wet weather operations were modified as follows: Three treatment plants operate in wet weather serving the three major drainage basins in the City. The 1971 Master Plan projects included (1) construction of transport storage structures to store combined sewage and storm water during wet weather, and (2) increased treatment rates at the three treatment plants, with the North Point plant coming on line in wet weather to augment the capacities of the other two plants. The combination of storage and increased treatment rates combined to reduce dramatically the combined sewer discharges.

Implementation of the new program began in 1974 with certification of the EIR/S. The Master Plan called for a staged implementation of the new infrastructure, dividing the work into more than 15 separate projects, each of which required environmental impact reviews pursuant to state and city regulations.[25] Planning, design and construction proceeded on a project by project basis as environmental approvals were received and funding sources procured. In 1980, the Board of Supervisors reconfirmed the City's commitment to implement the Master Plan.[26]

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[22] Board of Supervisor's Resolution No. 451-73 (July 1973).

[23] USEPA, Urban Stormwater Management and Technology: An Assessment, EPA-670/2-74-040, December 1974, at 367.

[24] *Id.*

[25] A list of these projects as of July 1983, along with their EIR certification status, may be reviewed at page 20 of the Final Environmental Impact Report, Yosemite Transport Storage Facilities, published by the City and County of San Francisco Department of City Planning, July 1, 1983.

[26] Board of Supervisor's Resolution No. 119-80 (1980).

D. There Were Concerted Efforts By the City, Regional Board and EPA to Identify Appropriate and Necessary Limits on CSOs

1. The Problem of Wet Weather Overflows

The Regional Board first adopted a plan for waters inland from the Golden Gate in 1968. After several revisions, the first comprehensive Basin Plan for the Region was adopted by the Regional Board and approved by the State Board in April 1975 ("Basin Plan"). The Regional Board had been in consultation with the City since the 1960s regarding the problem of wet weather combined sewer overflows. Indeed, the challenges of controlling combined sewer system wet weather overflows were reflected in the Basin Plan:

> The Basin Plan recommended that wet-weather overflow limitations be based on beneficial uses of the affected shoreline and specifically recommended overflow frequencies of 0.2 overflows per year to eight overflows per year. The Basin Plan also recommended that wet-weather overflows receive coarse screening to remove large visible floatable material, be discharged through outfalls designed to achieve a 10:1 initial dilution, be removed from dead-end slough and channels, and be discharged away from beaches and marinas. However, earlier in their discussion of wet-weather overflow problems, the authors stated that: "The approach presented is conceptual and should not be interpreted as rigid numerical objectives. The specified control levels are based on available information and should be evaluated by the Regional Board and other agencies prior to the designation of such levels for each area."

San Francisco Wastewater Program, The City and County of San Francisco, Bayside Wet Weather Facilities Revised Overflow Control Study, May 1979 ("May 1979 Bayside Control Study"), at II-2 to II-3.

Additionally, EPA required a cost-benefit analysis be performed by municipalities for proposed overflow control structures if federal funding were sought under the CWA. *See, e.g.*, Section VIII, Cost Benefit Analysis, May 1979 Bayside Control Study, VIII-1. For example, the EPA's Program Requirements Memorandum No. 75-34, which set forth rigid planning and funding policy and approval criteria for the control of combined sewer overflows, cautioned that "projects are funded only when careful planning has demonstrated they are cost-effective." *Id.*

Mindful of these considerations, the City worked with the Regional Board to determine the appropriate level of wet weather overflow controls for the City's new diversion structures. As part of the study preceding the publication of the 1971 Master Plan, the City evaluated the corrective measures necessary to reduce wet weather overflows from its system and the corresponding costs and benefits to the receiving waters of the Bay of implementing such measures. The City decided, after discussions with Regional Board staff, to evaluate the alternatives of overflow frequencies of 8 times per year, 4 times per year, one a year, and once every 5 years. Preliminary Summary Report, at VII-1 The City determined that the cost (in 1974 dollars) of reducing overflows to a frequency of once per five years would be $665 million, while the cost of reducing the overflows to 8 times per year would be significantly less at $333 million. Preliminary Summary Report, at I-1 to I-11. The City's discussions with the Regional Board about the costs and benefits of differing levels of overflow controls would continue over the course of the next decade as the state and federal agencies developed regulations and

guidelines for the design, construction, financing and approval of projects to address combined sewer overflows.

For example, in 1976, the Regional Board issued NPDES permits for several of the City's wet weather diversion structures. The permit for the North Point Sewerage Zone (Regional Board Order No. 76-24) originally called for no more than one overflow per year for outfalls 9 through 17 and 4 overflows per year for outfalls 18 through 28. Yet the permit also directed the City to "undertake a citywide overflow control study to better define the cost and water quality benefits of facilities designed to achieve various overflow frequencies." Regional Board Order No. 78-102, November 21, 1978, at 1. After the City submitted the results of its overflow control study, the Regional Board increased to four per year the allowed overflows for outfalls 9 through 17. *Id.*, at 4. Likewise, when the Regional Board issued its NPDES permit for the Richmond Sunset Sewerage Zone (Regional Board Order No. 76-23), it originally called for no more than one overflow per year for outfalls 1 through 8. Regional Board Order No. 79-12, January 16, 1979, at 1). This frequency was subsequently increased by the Regional Board to eight per year in January 1979. *Id.*, at 4.

With respect to the Southeast Zone, the area of the sewer system pertaining to Yosemite Creek, the Regional Board issued an NPDES permit dated June 19, 1979 (Regional Board Order No. 79-67). This permit addressed the diversion structures (or outfalls) for the first time in the Southeast Sewerage Zone and revisited the previously addressed diversion structures in the Northpoint Zone, in part based on the EPA's objections. In consideration of the City's overflow diversion study submitted for outfalls 18 through 43 in May 1979, the Regional Board issued a new NPDES permit ordering the City

> to design and construct facilities for diversion structures No. 9-17 to achieve a long term average of 4 overflows per year from these facilities, to design and construct facilities for diversion structures No. 18-35 to achieve a long term average of 10 overflows per year, and to design and construct facilities for diversion structures No. 36 through 43 to achieve a long term average of 1 overflow per year.

Regional Board Order No. 79-67, dated June 19, 1979. Outfalls numbered 40, 41, and 42 drain into Yosemite Creek. *Id.*, at 1. It was pursuant to this permit and required state and local environmental approvals, that the City began construction of the Yosemite Transport/Storage Facility, discussed in Section E, *infra*.

2. Early Concerns Regarding Sewer Discharges Focused on Settleable Matter, Toxicity and Biochemical Oxygen Demand

While the Regional Board regulated the discharge from the City's wastewater treatment plants as early as 1951,[27] it was not until 1967 that the Regional Board adopted the first numerical receiving water standard for the City's discharge, i.e., 5.0 milligrams per liter (mg/l) of dissolved oxygen in the tidal waters where the City discharged.[28]

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[27] California Regional Water Quality Control Board – San Francisco Bay Region, Resolution 69-43.

[28] California Regional Water Quality Control Board – San Francisco Bay Region, Resolution 70-3, Notifications January 29, 1970, at 1.

Subsequent regulation of the discharge by the Regional Board in 1969 added requirements for controlling dissolved sulfide and pH in receiving water and set effluent limits for settleable matter, toxicity and biochemical oxygen demand (BOD). The 1969 Regional Board resolution also required the City to present a schedule and cost estimate to address: reduction in clarity, floatables, grease and settleable matter in its discharge.[29] The Regional Board, however, did not prohibit nor even advise that it was inappropriate for the City to discharge overflows to Yosemite Creek. Rather the Regional Board identified that "waste disposal, dispersion and assimilation as economic beneficial water uses." California Regional Water Quality Control Board – San Francisco Bay Region, Resolution 69-43, September 25, 1969, at 6.

A subsequent 1970 Regional Board resolution (Resolution 70-3) required the City to submit preliminary engineering report and cost estimates for facilities to control "settleable matter and grease." California Regional Water Quality Control Board – San Francisco Bay Region, Resolution 70-3, January 29, 1970, at 6. The only admonition to the City regarding its discharge included in the 1970 Regional Board resolution was that it "suspected contamination caused by sewers overflowing onto City streets during wet weather." *Id.* By the early 1970s, the Regional Board was beginning to expand its focus from "solely physical pollutant parameters such as floatables, settleables, suspended matter, and temperature to include pollutant parameters that are directly influenced by industrial discharges." City and County of San Francisco, Department of Public Works, Annual Report, San Francisco Industrial Waste Program for Calendar Year 1973 ("1973 IWP Annual Report"), at II-9.

As discussed further in Section III, *infra*, in response to the Regional Board's requirements, the City adopted the 1971 Industrial Waste Ordinance, amending the Public Works Code by adding Article 4.1 Industrial Waste Discharge Regulations ("1971 Ordinance").[30] The City's 1971 sewer ordinance regulated the discharge of wastes for: pH; phenols; dissolved sulfides; temperature; toxicity; grease; suspended matter; and chemical oxygen demand.[31] In addition, as part of its commitment, the City developed the 1971 Master Plan for management of CSOs including the development of "inland and shoreline underground retention basins to retain the combined flow for subsequent treatment."[32]

While the Regional Board ordered the City to implement measures to address CSOs in 1972, the efforts were addressed at settleable matter, not the Yosemite Creek chemicals of concern, *i.e.*, metals, pesticides, PCBs or other industrial wastes.[33] Pursuant to the CWA, EPA

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[29] California Regional Water Quality Control Board – San Francisco Bay Region, Resolution 69-43, September 25, 1969.

[30] City and County of San Francisco Department of Public Works, Industrial Waste Branch Report and Recommended Action for Director's Hearing of October 2, 1974 at 9A.M. Room 282, City Hall, August 29, 1974, at 1.

[31] San Francisco, Cal., Ordinance No. 15-71 (January 1971).

[32] City and County of San Francisco, Department of Public Works, *San Francisco Master Plan for Waste Water Management, Preliminary Summary Report*, September 15, 1971, at ii.

[33] California Regional Water Quality Control Board – San Francisco Bay Region, Order No. 72-91 (Oct. 26, 1972).

issued the National Pretreatment Program regulations in June 1978.[34] Yet, it was not until the 1980s that the first efforts were taken by EPA to assess priority pollutants in CSOs.[35] Findings from EPA studies at 50 Publicly Owned Treatment Works (POTWs) revealed that concentration of toxic pollutants (particularly metals) in the influent to POTWs served by a combined sewer collection network increased significantly during and immediately following a storm event. Based on these results, the EPA initiated a study to characterize priority pollutants in CSOs. The findings revealed contributions of lead, copper and zinc, at higher concentrations during the initial phase of the storm event followed by dilution effect as the storm progressed. Pesticides were not found to be prevalent in CSOs.[36]

E. The Yosemite Transport/Storage Facility: Built to Capture, Store, and Transport for Treatment Wet Weather Overflows

The early phases of the Master Plan focused on improvements to the City's treatment plants and consolidation of various outfalls. Eventually, consensus was reached between the City, Regional Board, and EPA regarding the appropriate level of overflow controls, and subsequent phases of the Master Plan included construction of the Yosemite Transport/Storage Facility. This facility was designed to control and reduce the discharge of stormwater and untreated sewage into the southwest portion of the San Francisco Bay during wet weather events through construction of large storage and transportation facilities near Yosemite Creek to capture the overflows and transport them to the Southeast Treatment Plant for secondary treatment. Once completed, this new infrastructure would reduce overflows into the Yosemite area to an average of one per year. *See* Final Environmental Impact Report, Yosemite Transport Storage Facilities, published by the City and County of San Francisco Department of City Planning, July 1, 1983, at 1-2. The final environmental impact report for the project was certified on October 27, 1983, and the facilities were up and running by 1989. Since then, wet weather overflows into Yosemite Creek have been limited to an average of once a year.

The City's implementation of the 1971 Master Plan was completed in 1997. According to the Regional Board, "San Francisco [was] one of the first municipalities in the nation to complete a comprehensive control program for a combined sewer system." Regional Board's Basin Plan, Chapter 4, Section 4.11.1.[37] As of 2004, the EPA reported that the City's CSO controls had "reduced the number of CSO events and pollutant loads by an average of 88%."[38]

At the same time the City was working on controlling waste discharges to the Ocean and Bay from wet weather overflows, it was improving its program to control industrial waste discharges to the sewer system. We turn to that next.

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[34] USEPA, *Guidance Manual for POTW Pretreatment Program Development*, EPA-833-B-83-100 (Oct. 5, 1983), at 1-2.

[35] USEPA, *Combined Sewer Overflow Toxic Pollutant Study*, EPA-440/1-83/304 (Mar. 1983), at 7.

[36] *Id.*, at 1.

[37] *See* http://www.swrcb.ca.gov/sanfranciscobay/basinplan.shtml.

[38] EPA, Report to Congress, Implementation and Enforcement of the Combined Sewer Overflow Control Policy, December 2001 (available at http://www.epa.gov/npdes/pubs/csortcexecsum.pdf)

III. The City Was Proactive in Implementing an Industrial Waste Control Program Consistent with Existing and Anticipated State and Federal Requirements

The City enacted its first Industrial Waste Ordinance in 1953. This early program was focused on prohibiting discharges into the sewer system of substances likely to damage the system or the treatment process. Examples of prohibited discharges were grease and other solid substances that could accumulate and cause blockages, corrosive substances that could damage the collection and transportation system, and "slug" discharges of industrial based chemicals that interfered with the treatment processes. S. Myron Tatarian, Robert C. Levy, *Annual Report, San Francisco Industrial Waste Program for Calendar Year 1973* ("1973 IWP Annual Report"), at II-11 to II-12. As advances were made in the 1950s and 1960s in the understanding of the deleterious impacts of industrial pollutants on the beneficial uses of the San Francisco Bay, the City recognized that a new Industrial Waste Ordinance was needed to protect these waters, as well as to meet the Regional Board's requirements for discharge to the Bay.

This new ordinance was first presented to the Board of Supervisors in April 1970, and passed in January 1971.[39]

> Basically, the philosophy of this ordinance, as being prepared, is that domestic sewage or its equivalent characteristics should be accepted at all treatment plants without pretreatment but that any substance in the discharge from the industrial plant which might be harmful to the sewer system, the treatment plant or could not be easily treated at the plant and would be harmful to the receiving waters of the Bay, should be removed by the individual discharger prior to discharging into our sewer system.

April 20, 1970 Letter from Thomas J. Mellon, Chief Administrative Officer, to the Board of Supervisors ("Mellon Letter"), p. 2.

The 1971 Ordinance was one of the most rigid of its kind in the country at the time and adopted state of the art practices and procedures. It incorporated the definitions, laboratory analytical procedures, and test and measurements of the Twelfth Edition of "Standard Methods for the Examination of Water and Sewage," published by the American Public Health Association, the American Water Works Association, and the Water Pollution Control Federation. 1971 Ordinance, Section 119, at 2. Similarly, "[w]ith only minor differences," the 1971 prohibited discharge of the same wastes identified in the pretreatment standards proposed by EPA as of 1974. 1973 IWP Annual Report, at II-4 to II-5.

The 1971 Ordinance specified several categories of industrial waste discharges, including:

> (1) substances specifically prohibited from discharge into the sewer system, including "[a]ny toxic, noxious or malodorous gas or substance which either singly or by interaction with other wastes, is capable of creating a nuisance or hazard to life and limb or of preventing maintenance of the Sewerage system" (Sec. 121(e), at 6);

[39] San Francisco, Cal., Ordinance 15-71(Jan. 8, 1971).

> (2) constituents allowed within specified numerical effluent limits (including toxicity, pH, and dissolved sulfides) (Sec. 122, at 6); and
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> (3) substances such as grease, suspended matter, and chemical oxygen demand, which were permissible but subject to an additional fee when the concentration exceeded that which would be expected from normal domestic sewage to compensate the City for its additional treatment expense (Sec.122.3, at 7-9).

The 1971 Ordinance created an industrial waste program designed to identify and monitor industrial dischargers. At the time it was enacted, the City estimated between 3,000 and 4,000 dischargers would be covered by the program. Given the number of industries in San Francisco at the time, the City elected to employ a self monitoring program similar to that used by the Regional Board. City employees would be used to spot check the monitoring programs to ensure compliance. Mellon letter, at 2. As part of the monitoring program, waste discharge reports were required of all dischargers, which included a laboratory analysis of the discharger's waste stream. (Sec. 123.3, at 14-15.) The 1971 Ordinance also provided, among other things, for the establishment of procedures whereby a discharger could seek a variance upon proof that excusal from strict compliance would not have a deleterious effect on the City's sewer facilities or the Bay.

Throughout much of the 1970s, the City operated under the 1971 Ordinance, anticipated as best it could the evolving federal requirements under the Clean Water Act. For example, as of 1974 the City commented:

> Because the City does not yet have its NPDES permits, it is difficult to accurately determine the actual toxic concentration limitations on source categories for which standards have been promulgated. This results from a provision of the Administrator's Guidelines for Pretreatment Standards, that effluent limitations for Incompatible Pollutants may be less stringent to the degree that the NPDES permits commit the City's treatment plants to removal of that pollutant.

1973 IWP Annual Report, at II-7.

As environmental regulations changed, the City responded. For example, on June 7, 1977, the City amended the 1971 Ordinance to modify the discharge limitations for several specified constituents. *See* Ordinance 199-77.[40] Since then, the City has continued to amend its discharge regulations to comply with the prevailing Federal and State regulations at the time.

IV. On the Foregoing Record, the City is Entitled to Invoke CERCLA's Third Party Defense

We provided the foregoing overview of the historical environmental and regulatory context within which the City managed wastewater discharges from its sewer system because it is critical to an understanding that the problems caused by CSOs did not happen overnight, it took years for federal, state and local governments to figure out the best way to fix these problems, and that it took just as long—if not longer—to implement the solution.

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[40] City and County of San Francisco, Department of Public Works, Notification of Director of Public Works Hearing: May 28, 1986, Room 282, City Hall, 930 A.M. (undated).

To recap, a party asserting a third party defense "'must demonstrate he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all the relevant facts and circumstances.'" *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1276 (E.D.Cal. 1997) (quoting *New York v. Lashins Arcade Co.*, 91 F. 3d 353, 361 (2d Cir. 1996) (emphasis added). *Also*, *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053, 1082 (C.D. Cal. 2003); *Lincoln Properties Ltd. v. Higgins*, 823 F. Supp. 1528 (E.D.Cal. 1992); *Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 682 (4th Cir. 1995). Accordingly, the City need only establish it took the necessary due care and reasonable precautions with respect to the operation of its sewer system and the contamination now known to be present in Yosemite Creek.

We address this question from two perspectives: (1) the City's handling of its CSOs and (2) the City's efforts to prevent pollution from industrial discharges into the sewer system, including pollution from the former Bay Area Drum Site.

A. The City Acted Responsibly and Proactively In Addressing Water Quality Impairment Caused by CSOs from its System

Assuming that contaminants from the former Bay Area Drum site were transported to Yosemite Creek via the City's CSOs during wet weather events, there is no evidence that any wrongful conduct by the City contributed to the releases. Just the opposite, the record demonstrates that the City took due care and reasonable precautions to prevent contaminants from being discharged into the sewer system. The City also took due care and reasonable precautions to prevent contamination of the Bay from sewer discharges, whether from the City's treatment plants or from CSOs.

As discussed above, the problems with contamination from CSOs were not reasonably foreseeable before the 1960s, at which time the City began to study ways to address them. Nor was it foreseeable that pollutants in CSOs could have contributed to the contamination found in the Yosemite Creek sediments prior to the 1980s. Any pollutants in CSOs discharged from the City's system during wet weather events, whether to Yosemite Creek or elsewhere, would have been diluted with more dilute water as the storms progressed. Once the City became aware of the issues associated with CSOs, it undertook one of the largest infrastructure programs in the country to address them.[41]

The PRP Group insinuates that the City delayed in implementing the sewer upgrade. (See PRP Memo at p. 7: "It is difficult to conceive how such a record [sic] delay, blown deadlines, and repeated defiance of RWQCB and EPA mandates could constitute due care.")

This is simply not a situation where a sewer operator had within its means the ability to remedy a situation causing a release of hazardous substances into the environment, such as failing to repair a cracked sewer line leaking contaminants into the soil and groundwater. Replacing a broken sewer pipe is a problem of a vastly different magnitude than that of

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[41] The PRP Group insinuates that the City intentionally dragged its feet in implementing the sewer upgrade. (See PRP Memo at p. 7: "It is difficult to conceive how such a record [sic] delay, blown deadlines, and repeated defiance of RWQCB and EPA mandates could constitute due care.") It is clear from the record provided by the City that this insinuation is misplaced. There is no evidence the City was reluctant to make the improvements. There **is** plenty of evidence that the problems were ones that could not be fixed overnight and required tremendous financial contributions from the City, State and Federal governments.

eliminating overflows from a combined sewer system serving a city the size of San Francisco. Moreover, the CSO problem wasn't one known only to the sewer operator, which in turn took no action to correct. The CSO problem was (and still is in many communities) a national problem that was well known to Federal and State officials, who were and are very much part of the solution.

CERCLA does not mandate that the City should have had a greater understanding of the potential environmental consequences from CSOs than the Federal or State governments. Yet, the City was further ahead than most municipalities in dealing with environmental problems caused by CSOs. Indeed, the same year that the City's Yosemite Transport/Storage Facility was completed and wet weather overflows into Yosemite Creek were reduced to one per year, the EPA first published a national strategy to control and reduce pollutant overflows from CSOs.[42] Given the tremendous expense of overhauling the City's combined system, expense explicitly recognized by the Federal and State funding programs, the City was justified in taking the necessary time to develop the best and most cost-effective plan for controlling CSOs and upgrading its entire sewer system. Once the timeline of events is laid out, as we have done here, it is evident that the City acted with due care and the necessary haste to address the environmental problems caused by CSOs.

B. The City Acted Responsibly, Proactively, and With Due Care In Addressing Threats to Water Quality By Industrial Discharges, Including Bay Area Drum

Likewise, the City responded to the concerns of the Regional Board regarding industrial waste discharges to the sewer system by enacting a strict industrial waste ordinance in 1971.[43] The City then developed a program to identify industrial dischargers within the City, required them to submit waste discharge reports identifying their industrial wastes, and implemented a system requiring pretreatment of industrial wastes before discharge into the sewer system. 1973 IWP Annual Report. The City's ordinance proscribed waste discharges consistent with the regulations, standards, and practices in place at the time. And although the City had between 3,000 and 4,000 industrial dischargers within its limits, its inspectors identified the operations of the former Bay Area Drum Site as a discharger that needed to be closely monitored and worked with the facility operators to procure their compliance with the City's ordinance. The record from the City's regulatory file for the former Bay Area Drum Site speaks volumes to the City's commitment to enforcing its industrial waste program. We turn to that next.

EPA's Yosemite Creek Superfund Site investigation identified the former Bay Area Drum Site (formerly known as Bedini Brothers Drum Co. and Waymire Drum) as the source of contamination in Yosemite Creek.[44] The Bay Area Drum Site was the location of various drum

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[42] Memorandum from the USEPA Setting Forth its Final National Combined Sewer Overflow (CSO) Control Strategy, (Aug. 10, 1989), at 1 (published in the Federal Register on September 8, 1989 (54 Fed. Reg. 37,370 (Sept. 8, 1989)) (available at http://www.epa.gov/npdes/pubs/owm0356.pdf).

[43] The PRP Group complains the City's ordinances were not stringent enough because they did not explicitly prohibit discharge of the COCs at issue here. However, they fail to identify any regulations in place at that time that addressed these constituents in wastewater discharges. Again, 20/20 hindsight is terrific, especially when you are trying to point the blame at someone else.

[44] USEPA, General Notice of Potential Liability, Yosemite Creek Superfund Site (Feb. 21, 2008), at 2.

recycling operations over several decades, where used drums were cleaned and restored for subsequent reuse. Operations at the facility involved the use, among other substances, of caustics (a high pH solution of sodium hydroxide) for cleaning operations. Wastewater from these drum refurbishing operations was known to have been discharged to the City's sewer.

As identified by EPA, the chemicals of concern ("COCs") at the Yosemite Creek Superfund Site include: polychlorinated biphenyls (PCBs), DDT, dieldrin, chlordane, lead, zinc and mercury.[45] However, based on the regulatory records available, years of monitoring of discharges from site operations did not reveal violations for these chemicals. To the contrary, the acknowledged exceedances in the discharges from the records were of chromium and high pH, none of which are related to the COCs.

Although drum refurbishing operations known to have occurred beginning in the late 1940s, there are no records of the waste streams from these operations prior to 1963. The first available record speaks to the City's vigilance in protecting the sewer system, for it was the City's own industrial waste inspector that discovered in 1963 that Bedini Drum ("Bedini") was discharging its wastewater into the City's sewers.[46] Upon the discovery, the City immediately informed Bedini that its industrial waste treatment was "very inadequate" and that a satisfactory system would need to be installed. Further evidence of the City's efforts to control unwanted discharges was provided by one of the Bedini owners during the 1963 inspection, when he acknowledged that "he had heard from other business sources of our [City] concern over undesirable waste entering the city sewer."[47]

The next available records follow the enactment of the 1971 Ordinance. In accordance with the City's procedures, it sent Bedini Steel Drum a Waste Discharge Report in June 1972 that required the monitoring of its discharges into the sewer system.[48] Bedini Drum conducted sampling between November 13 and 17, 1972, and submitted its Waste Discharge Report on December 15, 1972.[49] Laboratory analysis of the effluent from Bedini Drum did not reveal DDT, dieldrin, chlordane, PCBs, or mercury above the laboratory-reporting limit. While laboratory analysis did reveal the presence of lead and zinc in the waste effluent, there were no effluent limits for these constituents in wastewater at this time. The only problem identified at the time of the wastewater characterization was the pH of the effluent. Hence, the City issued a notice of violation that required "take immediate corrective action towards bringing the pH of

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[45] USEPA, Action Memo, Request for a Time-Critical Removal Action at the Yosemite Creek Site in San Francisco County, California (undated).

[46] Inter-Bureau Memo from City and County of San Francisco Department of Public Works to Bedini Bros. Drum Co. (October 10, 1963), at 1.

[47] *Id.*

[48] Letter from City and County of San Francisco Department of Public Works to Bedini Steel Drum, Inc. (Sept. 22, 1972).

[49] Waste Discharge Report from Bedini Drum to City and County of San Francisco, Department of Public Works, Bureau of Water Pollution Control (Dec. 15, 1972).

your waste within limits set forth in the Industrial Waste Ordinance."[50] Bedini committed to making changes in its operations and "intercept its caustic washing and not put in sewer."[51]

Based on subsequent inspections by the City, in October 1974, the City issued Order No. 99695 to Bedini with compliance deadlines to meet the discharge requirements of the 1971 Ordinance, as well as additional requirements for progress reports, establishment of a self-monitoring program, and including construction of a sampling point.[52,53] On May 12, 1976, the City issued Order No. 105001 to Bedini regarding compliance with the 1971 Ordinance, citing violations of pH, COD, grease, suspended matter and dissolved sulfides; and ordered Bedini to "[c]omplete, where practicable, improvements in housekeeping and process, that will minimize or eliminate the discharge of heavy metals...into the sewerage system."[54]

As follow up to its ongoing inspections, the City issued additional orders on November 3, 1978, and June 18, 1980, to Waymire Drum Company ("Waymire") (formerly Bedini) for compliance with "Code limitations." Specifically, the City ordered Waymire shall: "[e]liminate" the use of chromium containing water treatment chemicals;" and "[c]omplete, where practicable, improvements in housekeeping and process, that will minimize or eliminate the discharge of heavy metals...into the sewerage system.[55,56] However, it should be emphasized that the violation by Waymire were for discharge of chromium, not lead, mercury or zinc. Based on data collected, there is no indication that any discharge violations at the Bay Area Drum Site contributed to the contamination at Yosemite Creek. Further monitoring by the City in 1984 and 1985 led the City to issue notices of violation.[57,58] Finally in 1986, the City ordered Bay Area

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[50] Industrial Waste pH Violation from City and County of San Francisco, Department of Public Works to Bedini Steel Drum (undated).

[51] Telephone Memorandum, Phone Call from Mr. Bedini (July 20, 1973).

[52] City and County of San Francisco Department of Public Works, Order No. 99695 to Bedini Steel Drum Co., 1212 Thomas Avenue, SF, CA (October 16, 1974).

[53] City and County of San Francisco Department of Public Works, Industrial Waste Branch Report and Recommended Action for Director's Hearing of October 2, 1974 at 9A.M. Room 282, City Hall (Aug. 29, 1974), at 2.

[54] City and County of San Francisco Department of Public Works, Order No. 105001, Bedini Steel Drum Co. 1212 Thomas Avenue, SF, CA (May 12, 1976).

[55] City and County of San Francisco Department of Public Works, Order No. 113415 to Waymire Drum Company, 1212 Thomas Avenue, SF, CA (Nov. 3, 1978).

[56] City and County of San Francisco Department of Public Works, Order No. 118816 to Bay Area Drum, 1212 Thomas Avenue, SF, CA (June 18, 1980).

[57] Letter from Mr. Steven Medbury, City and County of San Francisco Department of Public Works to Mr. Jack Hamilton of Bay Area Drum, Notice of Violation of Industrial Waste Ordinance (June 29, 1984).

[58] Letter from Mr. Steven Medbury, City and County of San Francisco Department of Public Works to Mr. David Cannon of Bay Area Drum, Notice of Violation (Oct. 8, 1985).

Drum to cease its discharge discharges of pollutants to City's sewerage treatment system in violation of numerical limits.[59]

Based on the regulatory file for the Bay Area Drum Site, it is evident that the City could not have foreseen that discharges from the site would contribute to COC contamination found in Yosemite Creek. Further, upon discovery of any conditions of potential concern at the facility, the City required the site operators to implement corrective measures, which appeared for the most part to have been implemented to the reasonable satisfaction of the City inspectors. Moreover, the City continued to regularly inspect and monitor the facility. While 20/20 hindsight may suggest that the measures taken by the facility operators were inadequate, "[v]iolations of the law are not 'foreseeable acts'" under CERCLA. *Lincoln Properties*, 823 F. Supp. at 1544.

C. Cases Imposing Municipal Liability Are Readily Distinguishable on Their Facts Due to the Sewer Operator's Wrongful Conduct

The relevant legal standard is plainly set forth in CERCLA. While the caselaw applying this standard is helpful, each situation must be decided on the unique facts and circumstances presented. Therefore, we do not provide an extensive discussion of all the published decisions applying the third party defense, decisions that are undoubtedly known to EPA. We note, however, those courts imposing CERCLA liability on municipalities have done so because of affirmative conduct that directly contributed to the contamination at issue.

The PRP Group has contended this matter should be governed by the court's decision in *Westfarm Assocs. Ltd. P'ship. v. Washington Suburban Sanitary Comm'n.*, 66 F.3d 669, 682 (4th Cir. 1995) ("*Westfarm*"). We expect our submission here will persuade otherwise. One of the most significant differences between the conduct of the sewer operator in that case and the City here is the contamination in Westfarm was proximately caused by the sewer operator ("WSSC"). In that case WSSC turned the proverbial blind eye to the waste management practices of the dry cleaning facility. As the court noted, WSSC knew back in 1974 that hazardous chemicals were used at the facility and disposed of into the sewer. In 1977, WSSC knew from inspections of its own system that there were leakage problems with the very line serving the facility. And, based on inspections of the facility in the early 1980s, WSSC knew that PCE was used in significant quantities, yet asked no questions about how that chemical was disposed. This undisputed evidence caused the court to conclude "WSSC had the power to abate the foreseeable release of PCE, yet failed to exercise that power." *Westfarm*, 66 F.3d at 683.

Westfarm is similar to another decision imposing liability on a municipal sewer operator. *City of Bangor v. Citizens Communications Company,* 2004 WL 483201 (D.Me.). In that case the court found the City of Bangor failed to establish the third party defense due to its direct role in building a public sewer line for the purpose of transporting hazardous waste from a gas plant directly to a local river for disposal. The court found that under these circumstances, the city was a PRP under CERCLA both as an "arranger" and "operator," as well as disqualified from invoking the third party defense.

> In my assessment, the City of Bangor qualifies as a PRP with respect to the tar slick facility not only because it owns the inter-tidal zone, but also by virtue of its Nineteenth Century connection (quite literally) to the disposal of hazardous substances from the

[59] City and County of San Francisco Department of Public Works, Order No. 140481 to Bay Area Drum, 1212 Thomas Avenue, SF, CA (May 28, 1986).

> former gas plant into the Penobscot River. The summary judgment facts make it apparent that the City exercised its powers of eminent domain to effectuate or facilitate the construction in the middle part of the Nineteenth Century of an enclosed sewer drain that was installed specifically for the purpose of carrying away the waste of the private company that owned and operated the former gas plant.
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> This is more than standing by and failing to prevent contamination, as described in *Carson Harbor*.[60] This is contribution toward contamination on par with that present in *Westfarm* and implicates CERCLA's strict liability regime.

City of Bangor, at 11. As discussed extensively in this letter, no such wrongful conduct is present on the part of the City

We trust the foregoing information will satisfy the EPA's needs for a demonstration of the City's entitlement to CERCLA's third party defense. We reiterate that this submission has been compiled under considerable time constraints. To the extent EPA has remaining concerns about the City's due care with respect to this matter, we request that you advise us of your concerns so that we may address them promptly.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Elaine M. O'Neil
Deputy City Attorney

No Enclosures; Reference Materials Separately Provided

cc: Tommy Moala
John Roddy, Esq.

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[60] *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1194 (C.D. Cal. 2003) (Court declined to find municipal defendant liable under CERCLA as an operator based solely on evidence that it operated storm drain system that was a conduit for contamination and failed to do take action to prevent the contamination.)